

TIGARD WATER DISTRICT BOARD OF COMMISSIONERS

Serving the Unincorporated Area

**Tigard Public Library, Second Floor Conference Room
13500 SW Hall Blvd., Tigard, Oregon**

**Monday, June 25, 2007
7:00 p.m.**

Members Present: Beverly Froude, George Rhine, Janet Zeider, and Charles Radley
Members Absent: None
Staff Present: Dennis Koellermeier, Roger Dawes, Greer Gaston, and Joy Koss
Visitors: Clark Balfour
Commissioners Elect: Bert Cornick, Ken Henschel, and Julie Russell

1. Call to Order, Roll Call and Introductions

The Tigard Water District (TWD) meeting was called to order by Chair Froude at 7:04 p.m. All board members were in attendance.

2. Recognition of Commissioners Delphine, Froude, Rhine and Zeider

Mr. Koellermeier recognized and thanked Tigard Water District Board members for their years of service and presented them with a clock (former board member, Marc Delphine, did not attend the meeting).

3. Approval of Minutes – May 14, 2007

The minutes for the May 14, 2007 meeting were approved with a correction to the spelling of “Wakkila” on page 3.

4. Visitors Comments – See visitor comments under discussion topics.

5. Budget Adoption Process for Fiscal Year 2007-2008

Financial Operations Manager, Roger Dawes, explained that Oregon Revised Statutes state Contingencies can only be 15 percent of total Materials and Services. In accordance, Mr. Dawes revised the original amount allocated to Contingency from \$10,000 to \$8,000, and put the remaining \$2,000 in Ending Fund Balance.

After questions were addressed, Commissioner Rhine motioned to approve Resolution No. 07-01 adopting the Fiscal Year 2007-08 Budget as presented; Commissioner Zeider seconded the motion. The resolution was approved.

NOTE: The following topics on the agenda were discussed out of sequence.

8. Water Supply Update – Dennis Koellermeier

Mr. Koellermeier reported Bull Run, City of Portland, and the JWC systems have moved to stored water much earlier this year than normal. Mr. Koellermeier does not anticipate any problems occurring as a result of utilizing stored water earlier this year, nor does he anticipate any major components being off line for scheduled maintenance. Peak season usage is around 13-14 mgd.

11. Next Meeting Dates

- TWD Special Meeting at 7:00 p.m. on July 2, 2007, at Tigard Public Library, Community Room
- Intergovernmental Water Board (IWB) at 5:30 p.m. on July 11, 2007, at City Hall, Town Hall
- Joint IWB, City Council and Lake Oswego Work Session on July 17, 2007, at City Hall, Town Hall

9. IWB Update – George Rhine/Janet Zeider

Commissioner Rhine reported that most of the June 13, 2007 IWB meeting pertained to the Resolution for the Tenancy In Common Agreements for the Tigard Water Building and the Canterbury site. Another issue discussed was leak credits for a couple of residents.

In response to Chair Froude question if there were any conclusions drawn from that meeting, Commissioner Rhine said IWB members continued to feel that the Tenancy In Common Agreements were the right way to handle these particular items. A First Amendment to the Intergovernmental Agreement is required in order to execute them. That is why the topic has been brought back to Tigard Water District members to adopt and pass this Resolution.

6. Resolution 07-02 – Consider a resolution authorizing an amendment to the 1993 Intergovernmental Agreement, and the execution of Tenants In Common Agreements and Bargain and Sale Deeds for the Water Building and Canterbury properties.

Chair Froude explained that the Board's goal for the meeting was to review the agreements and vote. Clark Balfour, attorney for the TWD, was present to summarize the main points of the documents and recapped the discussion the IWB had with regard to those documents at their June 13, 2007, meeting.

The following italicized text was prepared by the Board and was inserted in the minutes as follows:

Mr. Balfour explained that with the Tenancy In Common Agreement, each partner of the IWB would have a vested interest in property. For instance, Tigard would hold 70% ownership and the TWD would hold 22% ownership. He also explained that the documents change how property transactions are dealt with in that if there is no written agreement, changes in property ownership would now require a simple majority vote versus a unanimous consent of the IWB, as before.

Mr. Balfour then addressed a number of questions from the Board and visitors, related to lease rates and proposed language in the documents. Visitors Henschel and Russell expressed concern about the new documents and urged the Board to delay voting. Another concern was raised about meeting notices and whether or not this and previous TWD Board meetings were properly noticed. Mr. Balfour explained that the Board should consider publishing their notices versus the past practice of posting.

After further discussion, Commissioner Rhine posed a motion to approve and adopt Resolution 07-02, with a second by Commissioner Zeider. The Board voted in favor of the motion 3:1; Commissioner Radley, who expressed displeasure with the motion, voted against.

7. Oregon Law ORS 198.320

The Board discussed the time requirements for appointing a new Commissioner for replacement of Marc Delphine. Mr. Balfour explained that the Statute does not dictate a time limit for doing this and does not lay out a process. The Board is under no obligation to fill the position.

Note: Commissioner Radley left the meeting at 9:16 p.m.

The remaining Board members elected to defer action on this point, as the vacant position will be filled as of July 1, 2007.

10. Non-Agenda Items

Ken Henschel requested public notice in the newspaper and postings for the Special Meeting scheduled for July 2, 2007.

Mr. Koellermeier announced information for registering new members for the Special Districts Association of Oregon needed to be submitted to staff for processing.

11. Adjournment

Commissioner Rhine motioned to adjourn, Commissioner Zeider seconded the motion, and the board voted unanimously to adjourn the meeting at 9:47 p.m.

On August 27, 2007, the current TWD Board unanimously motioned to have Commissioner Russell provide a more detailed summary of item 6 of the June 25, 2007, meeting minutes. Attached to this document is the summary received by City of Tigard staff on September 5, 2007. Staff has not reviewed the summarized minutes for accuracy to the audio tape.



Joy Koss, TWD Recording Secretary

Date: 9/11/2007

Clark Balfour explained that the IWB was presented with the various documents at the last meeting and amendments requested by IWB Members appear to have been incorporated here.

There are a few things you need to consider. First of all we talked in the past about an agreement you have that is 12 or 13 years old and has some rough spots in it. Particularly with respect to how you hold property and how you deal with property; those sorts of things. The proposal that has been put forth is to 1 – Have a tenancy in common agreement so each jurisdiction of the IWB is vested with its percentage of ownership and that its percentage of ownership is determined by the EES that this board commissioned back in 1994 to deal with how Tigard Water District Assets would be divided if a division were made. So the proposal that has come to you is to vest each jurisdiction with those percentages of ownership made back in 1993/94. In this case the TWD would have a 22% ownership in the properties and Tigard would have a 70% ownership.

Question 1 – Is this the most appropriate way to hold property, with a TIC? This is a way of holding property between unrelated parties. There are other ways to hold property, but the TIC is what is being proposed, and it is the most common way of holding property between unrelated parties. In order to do something with the property without an agreement, it would require unanimous consent. In the absence of this agreement one member could say they do not want to sell the property, and it could stop it. When you have TIC it is common to have agreements to break deadlocks, or to provide with something less than unanimous. That leads to other things and you may be in the minority, and you may have a decision forced on you that you don't like. On the other hand it prevents you from being handcuffed by that one person. It is a give-and-take depending on the situation. Do you want to have clear definitions as to how the property will be managed, leased and perhaps sold down the road? In the IGA you have the provision that says property will not be sold or transferred without unanimous consent. So the real thing with this TIC agreement and the resolution to amend the IGA is do you want to move from a unanimous consent to a supermajority three out of four? I think the resolution itself will authorize your representative to the IWB to take your approving vote if you decide to approve this resolution and then roll it to that meeting to say yes we agree - we approved the bargain in sale deed, yes we approve the amendments to the agreement and will execute the TIC. With that would come the first amendment to the agreement, which proposes to do a few things, and the most important is moving to a three out of four jurisdiction vote to make decisions, and second providing that any money that came from the sale of property is going to be used for water system capital improvements unless you take another vote to do something different with that money.

I think the real thing for this board to consider is whether or not you want to make the amendment to the IGA by passing the resolution authorizing the first amendment to the agreement and also authorizing the TIC.

Mr. Balfour then addressed a number of questions from the Board and visitors, related to lease rates and proposed language in the documents.

If the Board takes no action the rest of the members would be waiting to see what happens in the future. If nothing happens tonight at some point the board would have to take action and if the board votes no, the resolution would die. Right now the deed is listed as the TWD and it could not be transferred without this board

approval. Does this agreement fix the rough spots in the IGA? The answer is no, it does not fix all of the problems in the IGA.

Mr. Balfour suggested that the entire IGA should be rewritten.

Are there other ways the rough spots in the IGA could be cleaned up? The answer is yes. You could agree to some parts of these agreements. What do the changes to paragraph 5B asset ownership, rates in the IGA mean? I think what they were doing is that the same rates apply to all jurisdictions.

The lease is assuming that you have a TIC agreement. As far as commercial leases go it has very standard provisions, but there are some provision that are unique to the relationship of the parties. 1 – It has a term that takes you through Dec. of 2018. This is the same time which the IGA agreements expires. The IGA has no automatic renewal; this lease does have an automatic renewal at the tenant's option, for two successive five year options. Do you want to have a lease that could extend beyond the existence of the IWB? The second major issue is rent. This lease provides for a flat lease amount over the eleven years of the term. Typically, a clause is included for an increase in the rent. That is something you really need to look at. This lease does grant Tigard a right of first refusal.

Commissioner-Elect Ken Henschel raised issues and concerns regarding revisions of documents with no way to identify the documents, no date, or revision number. He noted that many revisions of these documents have been floating around, and that it was impossible to tell which one was the latest, s they had no version numbers and no dates. Mr. Henschel thought the revisions should be identified and due diligence should be followed. Mr. Henschel also had issues with the tenant writing the lease, deciding the lease amount, and no reference as to where the rates came from. He expressed concerns that Mr. Kollermeier is not qualified to determine lease rates nor is this an arms length transaction. Mr. Henschel requested the vote be delayed in order to allow more due diligence. He also suggested that any amendment to a document as important as the IGA should have public notice and hearings.

Mr. Balfour agreed with Mr. Henschel that the versioning/dating of documents was a valid point, and if a resolution was passed it would be a good idea to actually attach the agreement that you approved so that there is no question.

Commissioner-Elect Julie Russell asked which is better: for the TWD approving the resolution, or rewriting the IGA? Mr. Balfour suggested rewriting the IGA would be best, but due to the time issue it may not be available. Mrs. Russell also asked the question regarding the percentage of ownership in the EES study being different in two tables, the propionates assets and the proportioned ownership is different, and Mr. Balfour agreed he never understood the differences in the amounts. Mrs. Russell also urged the board to allow more time for public comment with such a short time frame.

(Comments located on the CD at 1:37:50) Mr. Balfour asked Dennis Koellermeier (COT) and Greer Gaston (COT) if the meeting notice had been published in the newspaper, and both agreed that they have never published meeting notices in the newspaper. Joy Koss (COT) said she posted the meeting notices on the buildings, and the Tigard Web Site has the agenda posted 48 hours prior to the meeting. She explained that the documents are never posted on the website, only the agenda.

Mr. Henschel quoted the ORS 198.610 public notice requirement and mentioned that posting a written notice on the Water District Building is poor notice, as that building is not even within the geographic boundaries of the TWD, and besides, it has been closed for months for construction.

(Comments located on the CD at 1:41:44) Mr. Balfour stated that:

TWD is a separate legal entity; it is a Special District providing water services. It has an obligation to follow the public meetings law which includes providing notices to the public, providing notices to interested people and providing notices to the news media. There is not a lot of guidance, but the Attorney General has come up with a public meetings manual that has probably the best statement of Oregon law. There are not many recorded cases on it. So in a way we use the Attorney General's Manual as a guide line. The Attorney General would tell you that you really need to handle those in a couple of ways. One is for people who have requested notice, those are called interested persons, that they should be given individual notice, either by mail or electronically (whichever is easiest for you and for them) of the notice of meeting and typically an agenda, which should have the principle subjects being discussed. It does not need to include all subjects, be all subjects discussed or all of the documents, just an idea of main business that will be discussed. So interested people have a chance to attend and give comments and participate. The media is the same way so if you have the Tigard Times you send something to them. Then there is what we call general notice, and general notice is typically publication or posting of notice. Publication in a newspaper of general circulation giving you an idea that the meeting is coming up, etc. You can open any paper and see those, you see the City of Tigard, Washington County, etc. Posting has been one method of getting notice out, but the Attorney General's Opinion to you would be that posting by itself may not be sufficient, and that publication notice (remember the statute says that you are supposed to give notice to your public that is reasonably calculated to apprise them of the meeting and the principal subjects to be discussed) achieves that when you have used a newspaper of general circulation. Web sites are a way to provide notice, but the problem we see here is that if you are accessing your information through the City of Tigard website, the TWD is a separate legal entity. If you had www.TigardWaterDistrict.com and then there was a link to the City of Tigard, that would be fine. I think that the board needs to take action as a separate legal entity, and have a publication as a separate legal entity. So now as far as what happens for the past five years, if something were not noticed properly the decision that you make is voidable for a period of 60 days. So what you've done over the last five years, if over 60 days has gone by it is all good. But publication of notice is something that needs to be looked at. If challenged, a court would probably find that you have a public meetings notice issue here tonight.

Mr. Balfour asked again if there was any notice published and Mr. Koellermeier responded no. Commissioner Rhine asked if it was published in the City of Tigard's Cityscape Newsletter. Mr. Balfour stated it does not need to be in the legal section, but you need to make an effort to have it published, so do you do that? Greer Gaston responded that they do not, and neither do they do not do that for their city council either. She noted that they used to do it, unless we have a land use decision we do not publish regular meetings. Cityscape Newsletters go mostly to Tigard residents with a few unincorporated residents receiving it but not all of them. Commissioner Radley asked Clark Balfour the question, "Since the City of Tigard is posting its meeting agenda on its own website is that ok?" Mr. Balfour asked if

the TWD and the City of Tigard boundaries overlapped and Commissioner Radley responded that they do not. Mr. Koellermeier stated if your question is would the City of Tigard publication cover the entire TWD boundaries that the answer is no. Mr. Balfour then asked how much of the TWD would a Tigard publication cover, and Mr. Koellermeier stated probably a minority. Mr. Balfour then asked how many customer counts are in the TWD? Mr. Koellermeier stated 3,761. Mr. Balfour then asked how many of those 3,761 customers would get Cityscape. No response was given to the question. Mr. Balfour then stated you have a meeting tonight, where this information was put on the City of Tigard website, so people could link through to the Tigard Water District if they know how to use that website. Mr. Balfour:

You posted notice of the meeting at the usual spots, where you have posted this information for the last few years. You were probably following the TWD procedures for a long time. So if the board wants to proceed you just have to know that the Attorney has called into question whether or not posting notice by itself is adequate, and that the preferred method would be that you publish the notice in a newspaper of general circulation before the meeting and again if the action were challenged down the road a judge would probably look very carefully with what the Attorney General has published. There is no decision out there that says posting is not correct and there is no decision out there that says you have to publish it in a certain manner. So with all of that you need to know there is a question out there.

Commissioner Rhine asked who is likely to question the decision? Mr. Balfour suggested it would leave an opening for a new board to come in and challenge a decision if you pass it tonight.

There was more discussion on how a new board would challenge this decision. Commissioner Radley stated that the bylaws state except in case of emergency all meetings are to be posted and published.